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10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

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14 UNITED STATES OF AMERICA,) SA-CR-06-129-AG
15 Plaintiff,) NOTICE OF MOTION; MOTION FOR
16 v.) DECLARATORY RELIEF PURSUANT TO
17 EDWARD SHOWALTER) *SANTOBELLO v. NEW YORK*: BREACH
18 Defendant.) OF PLEA AGREEMENT BY
) GOVERNMENT; POINTS AND
) AUTHORITIES; DECLARATION OF
) COUNSEL; EXHIBITS A & B

19 _____ Date: March 28, 2011
20 Time: 9:00 am

21

TO: UNITED STATES ATTORNEY ANDRE BIROTTA AND ASST. U.S. ATTORNEY
22 ANDREW STOLPER-

23

Please take notice that, on the above date and time, as soon as
24 counsel may be heard, the defense will bring the above-captioned
motion in the courtroom of the Hon. Andrew Guilford, 411 W. 4th St.,
25 #10D, Santa Ana, California.

26

Dated: Feb. 8, 2011

S./ H. Dean Steward

H. Dean Steward

Counsel for Defendant Showalter

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1 MOTION

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3 Comes now defendant, together with counsel, and moves this
4 Honorable Court for a declaratory order that the government has
5 breached the plea agreement herein. In turn, the defendant then
6 seeks one of two remedies set out in *Santobello v. New York*, 404
7 U.S. 257, 262 (1971): withdrawal of his guilty plea, or specific
8 performance and re-sentencing before a different court.

9 Dated: Feb. 8, 2011

S./ H. Dean Steward

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H. Dean Steward
Counsel for Defendant
Edward Showalter

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1 I. Introduction

2 As the Court is aware, this matter has been returned from the
3 9th Circuit for re-sentencing, now scheduled for April 25, 2011 at
4 9:00 AM. The defense here seeks to withdraw the defendant's guilty
5 plea based, *inter alia*, on *Santobello v. New York*, 404 U.S. 257,
6 262 (1971), because the government breached the plea agreement
7 herein. In the alternative, defendant seeks specific performance of
8 the plea agreement, and sentencing before a different court.

9 During the second and final sentencing hearing in this matter,
10 on March 3, 2008, the prosecutor asked the Court to impose a 151
11 month sentence, being the middle of the Guideline range of 135-
12 168.¹ [See Ex. A", p. 34, a transcript of the March 3, 2008
13 sentencing hearing]. The Court imposed that 151 month sentence.

14 This recommendation breached the plea agreement. The
15 government was obligated:

16

17 C) ***To recommend that the defendant be sentenced to the***
18 ***low end*** of the applicable Sentencing Guidelines range provided
19 the range as calculated by the Court provided that the Court
20 [sic] does not depart downward in offense level or criminal
21 history category.

22

23 Plea agreement, p. 8, lines 10-14, attached as Ex. "B"
24 [emphasis added]

25

26 ¹ The defense did not and does not agree that this is the correct
27 Guideline range. However, this is the range that the Court found
during the March, 2008 sentencing hearing.

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1 II. Government Breached Plea Agreement

2 The government, during sentencing on March 3, 2008
3 clearly violated the plea agreement. The prosecution was
4 obligated to recommend low end, 135 months. For whatever
5 reason, the prosecutor recommended 151 months, a clear and
6 unequivocal breach. "[W]hen a plea rests in any significant
7 degree on a promise or agreement of the prosecutor, ... such
8 promise must be fulfilled." *Santobello*, supra, at 262,
9 accord: *U. S. v. De La Fuente*, 8 F.3d 1333, 1340 (9th
10 Cir.1993).

11 "[P]lea agreements are contractual in nature and are
12 measured by contract law standards." *Id.* at 1337 (quoting
13 *U.S. v. Keller*, 902 F.2d 1391, 1393 (9th Cir.1990)). "In
14 construing the terms of an agreement and the parties'
15 obligations under it, the courts generally employ traditional
16 contract principles." G. Nicholas Herman, *Plea Bargaining*, §
17 10:04, at 190 (1997).

18 III. Remedies

19 In *Santobello*, supra, the Supreme Court addressed the
20 potential remedies after a finding of a breach of a plea
21 agreement by the prosecution:

22
23 "The ultimate relief to which petitioner is entitled we
24 leave to the discretion of the ... court, which is in a
25 better position to decide whether the circumstances of
26 this case require only that there be specific
27 performance of the agreement on the plea, in which case

1 petitioner should be re-sentenced by a different judge,
2 or whether, in the view of the ... court, the
3 circumstances require granting the relief sought by
4 petitioner, i.e., the opportunity to withdraw his plea
5 of guilty. We emphasize that this is in no sense to
6 question the fairness of the sentencing judge; the fault
7 here rests on the prosecutor, not on the sentencing
8 judge." *Id.* at 263.

9
10 See also *U.S. v. Camper* 66 F.3d 229, 233 (9th Cir. 1995),
11 ("Our remand for re-sentencing before a different judge in no
12 way implies criticism of the sentencing judge. Rather, it is
13 done simply to insure compliance with the plea agreement.");
14 *U.S. v. Turner* 951 F.2d 364 (9th Cir. 1991); *U.S. v. Partida-*
15 *Parra* 859 F.2d 629, 633 (9th Cir. 1988).

16 IV. Conclusion

17 Under *Santobello*, the remedies are either 1.) withdrawal
18 of the guilty plea, or 2.) specific performance and re-
19 sentencing by a different court. Defendant seeks an order
20 finding that the government has, in fact, breached the plea
21 agreement herein. He then seeks to withdraw his guilty plea.
22 In the alternative, he seeks specific performance and
23 sentencing before a different court.

24 Dated: Feb. 8, 2011 s./ H. Dean Steward

25 H. Dean Steward
26 Counsel for Defendant
27 Edward Showalter

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2 **CERTIFICATE OF SERVICE**
3
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5 IT IS HEREBY CERTIFIED THAT:
6
7 I, H. Dean Steward, am a citizen of the United States, and am
8 at least 18 years of age. My business address is 107 Avenida
9 Miramar, Ste. C., San Clemente, CA 92672.
10

11 I am not a party to the above entitled action. I have
12 caused, on Feb. 8, 2011, service of the defendant's:
13

14 **NOTICE MOTION; MOTION FOR DECLARATORY RELIEF**
15

16 on the following parties electronically by filing the
17 foregoing with the Clerk of the District Court using its ECF
18 system, which electronically notifies counsel for that party.
19

20 **AUSA ANDREW STOLPER**
21

22 I declare under penalty of perjury that the foregoing is true
23 and correct.
24

25 Executed on FEB. 8, 2011
26

27 s./ H. Dean Steward
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